

July 4. 1766.

Unto the Right Honourable the Lords of Council and Session,

T H E
P E T I T I O N
O F

JOHN STURROCK Heckler in Aber-
brothock,

Humbly sheweth,

THAT William or (as he sometimes subscribes himself) Gulielmus Milne, of this date, entered into an agreement with the petitioner, by which he became bound to serve him in heckling and weaving for three years, from Martinmas 1761, for certain wages to be paid him.

Accordingly, at that time, Milne entered into the petitioner's service, and had from that period several things furnished to him, and several sums advanced to him at different times by the petitioner.

On the other hand, the petitioner received some things from Milne, particularly two webs of Olnaburgh cloth,

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con-

1st Aug 1766
Petition of Decret published
however intended, was
still a piece of evidence.
at least equal to a
verbal Decret arbitral
Doubts still

Colston, think, &
thereby good, necessary
to the Decret into
a libel.
Affected & Men not
des. to say of a
unleashed Decret may
be used in modern
prosecutions.

John & Decret
into a libel &
ref. to the
ordinary to
proceed accordingly

August
1761.

containing 224 yards. These, Milne said, he was desirous should be disposed of, and for that purpose asked the petitioner to take them; and as the cloth was in the hands of one David Webster, the petitioner wrote out an order on him from Milne, which Milne got and returned him subscribed; and, upon production of it, the petitioner got the cloth, which he, of this date, entered to Milne's credit, both in the Waste-book and Ledger.

Sep. 15.
1764.

Nov. 26.
1764.

Of this date, Milne and the petitioner being to clear, the account in process was drawn out, in which Milne is debited with the different sums advanced to him, and with the value of the different things furnished to him; while, on the other hand, he is credited for the wages due him, and for the value of some things the petitioner had got from him, particularly 5 *l.* 12 *s.* as the value of two webs of Osnaburgh cloth, containing 224 yards, at sixpence *per* yard.

From this account, there arose a balance in the petitioner's favour of 5 *l.* 8 *s.*; but as Milne complained much of the fatigue he had had in the petitioner's service while in the country, the petitioner gave him up this balance, as mentioned in the account; upon which Milne granted him the discharge in process, which is as follows: "Arbroath, 26th November 1764, Then received from John Sturrock full payment of all accounts, or transactions, preceding this date, and same is discharged by (signed) William Milne."

After all this, Mr Milne nevertheless thought proper to pursue the petitioner for the price of the two webs; and as the libel and decret following thereon consists but of one page, and are of a singular nature, and contain facts material to be adverted to in the sequel, it will be best to take them in verbatim: "To the honourable the Magistrates of Aberbrothock, humbly means and shows, I William Milne heckler in Aberbrothock, that where

where, in the beginning of last month, I having two
 sale-webs in the custody of David Webster merchant,
 John Sturrock heckler in the said burgh, dunned me
 for several days for the said webs; in order, as he said,
 to send to London with James Davidson to sell for my
 account; to which I at last consented; but the more
 easily to come at the said webs, he the said John Stur-
 rock, as I am informed, produced and delivered up a
 precept, or order, for that purpose, to which my name,
 or subscription, is by some person or other adhibit;
 and accordingly the said John Sturrock received
 the said two webs from David Webster, and
 granted receipt therefor: but I am informed, that the
 said John Sturrock never shipped the same, and abso-
 lutely refuses to give me any account thereof: Where-
 fore, in all law, equity, and justice, the said John Stur-
 rock ought and should be decerned and ordained by
 decret of Court, either to make payment to me of the
 foresaid sum of 7 l. Sterling, as the value of the said
 two webs; or at least to find sufficient caution, that
 the same shall be immediately shipped for London, there
 sold to the best advantage; and that the price thereof
 shall be paid to me; with the sum of twenty shillings
 money foresaid in name of damages, and as the ex-
 pences of this process, according to justice. — Aber-
 brothock, the 5th day of December 1764 years, John
 Renny bailie, continues the action to next court-day, and
 ordains the order granted to David Webster to be pro-
 duced. (Signed.) *John Renny*. — Aberbrothock, the
 14th day of December 1764, John Renny Bailie, com-
 peared parties. The judge, after causing the pursuer
 write his name in Court, and some other papers being
 produced with his subscription, finds, that the draught,
 or order, by which the defender got up the two webs,
 does

does not have the subscription of the pursuer; and therefore decerns against the defender for the sum of 7 *l.* Sterling, as the value of the said two webs, with 10 *s.* Sterling of expences of plea, and ordains executories to pass; reserving action to William Milne against the defender, or any other person, who he can find has adhibit his subscription to the foresaid order. (Signed) *John Renny*. Against which sentence the defender, John Sturrock, appealed to the Lords of Justiciary. (Signed) *John Renny*."

Before the appeal taken by the petitioner came to be discussed, Milne and he having met, a submission was proposed and readily agreed to by the petitioner, who himself wrote the submission, which was signed by Milne and him before witnesses.

But soon after this submission, the petitioner having become apprehensive, from some expressions that dropt from one of the arbiters, and from several other circumstances, that justice would not be done him, he took an instrument against them, requiring them not to determine. However they paid no regard to this, and, of this date, pronounced a decreet-arbitral, Finding the petitioner liable to Milne in 7 *l.* 14 *s.* Sterling: But this decree is null for want of writer's name and witnesses.

June 27.
1705.

In August thereafter, Milne brought a process against the petitioner before the bailies of Aberbrothock, narrating the first decreet he had obtained before them, and the decreet-arbitral; and subsuming, that it was necessary for him to have a decreet of interposition, as the submission contained no clause of registration.

Various defences were proponed against this action: But the bailies over-ruled them all, and decerned. Upon which the petitioner applied for, and obtained a suspension, which having come in course before Lord Auchinleck,

(5)
leck, his Lordship, upon a representation for the petitioner against a decret in absence, with answers for Milne, pronounced the following interlocutor; " finds, that, as Feb. 19. 1766.
the submission is not on stamped paper, and has no witnesses subscribing, that it was no proper warrant for obtaining a decret of registration; but turns the decret into a libel, and appoints the procurator for Mr Milne, to make answer to the objections to the debt stated in the representation for John Sturrock, and to state how he instructs his claim; and this within eight days."

Against this interlocutor Milne preferred a representation, praying an alteration of the interlocutor; at least that, before answer, the Lord Ordinary would order, that the petitioner's receipt for the two webs should be produced, as also his books, and Milne's order on David Webster, in consequence of which they were delivered.

Upon this the Lord Ordinary ordered the representation to be answered; and, in the mean time, ordained the petitioner to produce the writings called for.

In obedience to this interlocutor, the petitioner produced his books, from which it appears, that both in the Day-book and Ledger the webs are entered to Milne's credit, on the 15th of September 1764; and in the Ledger they are stated at 5 l. 12 s. and in the Waste book at 3 s. more, which small variation was owing to no precise bargain being fixed as to the price at this time, that not having been done till the clearance. As to the other writing, viz. the order on Webster, and the petitioner's receipts, these were not, and did not fall to be in the petitioner's hands; they plainly fell to be produced by Milne himself; for it appears from the decret above inserted, that they were produced before the bailies of Aberbrothock, and he best knows what has become of them, and why they don't make their appearance now.

The Lord Ordinary, upon advising this representation, with the answers, was pleased to pronounce the following interlocutor. " Having again considered this representation, with the answers and writs produced, and especially that the submission is not denied to have been of the hand-writing of the suspender, and concerns the settling a small account between two manufacturers; finds the debt habily instructed by the decreet-arbitral; repels the reasons of suspension; finds the letters orderly proceeded, and decerns; and finds expences due." Against this interlocutor the petitioner begs leave to reclaim, being hopeful it will be altered, and the judgment first pronounced by the Lord Ordinary adhered to.

June 24.
1766.

The iniquity of the decreet-arbitral under challenge is apparent. On the 26th November 1764, Milne granted the petitioner an ample discharge of all accounts and transactions between them preceeding that date. The two webs in question were sold and delivered to the petitioner long before that time, as far back as the 15th September, as appears from the petitioner's books; and, even according to Milne's own showing, as far back as the beginning of November; for in his petition to the magistrates, which he preferred on the 5th of December, he sets forth, That the petitioner had got the goods " in the beginning of last month," that is November preceeding. These webs therefore must surely be understood to fall under the general discharge, as they are trifling furnishings, and of the same nature with the rest that compose the account between the parties: It would therefore require some very strong presumption, to induce your Lordships to believe, that they were not meant to be comprehended under this discharge; but Milne has not offered any one circumstance whatever to that purpose.

The story of the forged order upon Webster is evidently a fiction, and nothing to the purpose. Milne admits, that

that he agreed to give the petitioner the webs; consequently, there was no occasion for any order at all, and therefore no temptation to forge one, as the petitioner could have got them without any writing whatever. As to the new method of improbation followed by the bailie of Aberbrothock, in must appear very singular and curious. In order to try the question, whether the order was forged or not, the bailie, without citing the petitioner, or any other party, orders Milne to write his name; and on observing what he wrote was not exactly similar to the subscription at the order, he finds, that it "does not have the subscription of the pursuer; and therefore decerns against the defender for 7 l. Sterling." This extraordinary method was the more inexcusable in the bailie, that he knew very well, Milne, who is abundantly whimsical, was in use to vary his subscription as it struck him in the head, and sometimes to subscribe Gulielmus instead of William; but the decerning against a man without hearing him, is, if possible, still more extraordinary and unjustifiable.

Since then the petitioner had a general discharge from Milne, and since the webs in question naturally fell under that discharge, and Milne has not offered any one circumstance or presumption to take them out of it, it seems to follow that the decret-arbitral is unjust: so that the only question that remains is, whether the petitioner can be barred from challenging it on the head of iniquity; and he humbly apprehends he is not; because,

1^{mo}, The submission is null as not being stamped. That this is a nullity in a submission is a settled point, as will appear to your Lordships from a decision, thus abridged in the dictionary, vol. 2. page 543. *in fine*. "In a question, if submissions fall under the stamp act, it was urged, that a decret-arbitral needs not be stamped, being *quasi* a judicial act: But a submission is a contract, and ought

ought to be stamped as much as any other contract. The Lords found, that submissions are comprehended under the act. 1st January 1726, Crawford *contra* Withart.

2do, The decret-arbitral is null, because it wants writer's name and witnesses; and that this is also a nullity, appears from the dictionary, vol. 2. page 546. "A decret-arbitral is not a privileged writ; and therefore found null wanting witnesses. Fountainhall, 28th July, 1708, Lord Pitcur *contra* Lord Millhall.

The petitioner, with submission, cannot see how the nullity for the want of the stamp is taken off by the circumstance of its being wrote by himself. The stamp act makes no odds between writings that are holograph and those that are not; neither can he see how the smallness of the cause should take off the nullity of the decret-arbitral, arising from the want of writer's name and witnesses. A nuncupative legacy below 100 l. Scots, may, no doubt, be proved by witnesses; but it is new to maintain, that a bond or obligation for a sum of money below 100 l. Scots, ought to be sustained, though destitute of the solemnities which the law has required in writings in general.

It was argued for Milne, that verbal submissions and verbal decreets-arbitral had been sustained; and it is true, there are several old decisions to that purpose abridged in the dictionary, *voce* Proof, vol. 2. page 232; but these decisions cannot avail the charger; for verbal decreets-arbitral are challengeable on the head of iniquity, the regulations 1695, being expressly confined to decreets-arbitral on written submissions; so that, if the submission and decret-arbitral in question, are to be sustained as verbal, the petitioner is intitled to be heard against the decret-arbitral on account of its iniquity, which he has endeavoured to make out above.

But

But again these decisions do not apply; because, in fact, the submission here was not verbal, nor the decreet-arbitral either. The parties concerned agreed, that they should be both reduced into writing; into writing they both were reduced, but in a manner which the law repro- bates; and therefore they must go for nothing, although it were true that parties might have submitted, and arbi- ters determinèd this small matter verbally; because *quod potuit, non fecit; quod fecit, non potuit.*

*May it therefore please your Lordships, to review
the Lord Ordinary's interlocutor, and suspend
the letters simpliciter,*

According to justice, &c.

JO. MACLAURIN.